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HAND DELIVERY

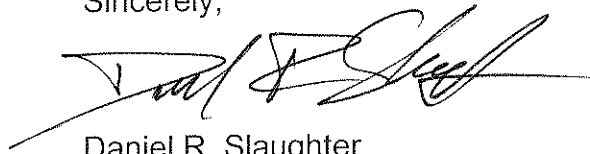
Nebraska Public Service Commission
Attn: Nicole Underhill
300 The Atrium
1200 "N" Street
P.O. Box 94927
Lincoln, NE 68509-4927

RE: Proposed Rules and Regulations No. 170

Dear Ms. Underhill:

Enclosed please find the original and eight copies of the Comments to Proposed Rules and Regulations on behalf of BNSF Railway Company. If you have any questions or concerns, do not hesitate to contact our office.

Sincerely,



Daniel R. Slaughter
dslaughter@wolfesnowden.com

DRS/jaa
Enclosure
cc: Deena Kumke via email

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own motion, seeking to amend Title 291, Chapter 7, Transmission Lines Rules and Regulations, to adopt rules regarding wires crossing any railroad track at public highway crossings in the State of Nebraska in accordance with Neb. Rev. Stat. §§ 75-702 to 75-724)))))))))	Rule and Regulation No. 170 Comments to Proposed Rules and Regulations
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BNSF Railway Company, a common carrier operating a rail line within the State of Nebraska (“BNSF”), hereby offers the following comments with regard to the those certain amendments to Title 291, Chapter 7, Transmission Lines Rules and Regulations, proposed by the Nebraska Public Service Commission (the “Commission”) in proposed Rule and Regulation No. 170 and its Order Opening Docket and Seeking Comment dated August 28, 2007:

I. The Proposed Rules and Regulations Constitute a Constitutionally Compensable Taking and Therefore Should Not be Adopted.

The Supreme Court has held that the minor but permanent physical occupation of an owner's property authorized by government constitutes a "taking" of property for which compensation is due under the Fifth and Fourteenth Amendments of the Constitution. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164 (1982). This is true even where the taking is relatively small. Id. at 430, 102 S.Ct. at 3173 (stating that "permanent occupations of land by such installations as telegraph and telephone lines, . . . and underground pipes or wires are takings even if they occupy a relatively insubstantial amount of space and do not seriously interfere with the landowner's use of the rest of the land."). Indeed, the Loretto court determined that the

presence of cable television lines and small junction boxes on a building owned by the plaintiff/landlord, arguably a less intrusive presence than a high-voltage electrical transmission line, constituted a constitutional taking. See, Id.

The proposed rules and regulations under consideration here would give the Commission the authority to establish the terms for crossing agreements for transmission lines and wires crossing railroad right-of-way at public highways. See, Proposed Rules and Regulations Section 003.04D2 (stating that “[t]he Commission shall have thirty (30) days from the date of hearing to issue an order resolving each and every issue set forth in the petition and the response with written findings and opinions. In determining the terms, conditions, and charges, the Commission shall consider whether such terms, conditions and charges are fair, just and reasonable and in the public interest.”).

Such authority is similar to the New York statutes at issue in Lorretto, which provided that a landlord may not “interfere with the installation of cable television facilities upon his property or premises” and may not demand payment from such company “in excess of any amount which the [state] shall, by regulation, determine to be reasonable.” Id. at 423, 102 S.Ct. at 3169.

Both the proposed regulations under consideration here and the statutes in Loretto remove from the landowner any authority to refuse access to the property by the third-party owner of the transmission line. Both the proposed regulations under consideration here and the statutes in Loretto provide for the state to prescribe compensation for the rights granted to the third-party owner of the transmission line. It is the confluence of these elements which prevents the landowner from enjoying his full rights as a

landowner, and therefore constitutes a governmental taking of property for which compensation is due under the Fifth and Fourteenth Amendments.

Accordingly, the proposed rules and regulations provide a mechanism for governmental takings for which compensation will be due under the Fifth and Fourteenth Amendments of the Constitution. Such takings are almost certain to spawn litigation from landowners alleging that they have been unjustly under-compensated and deprived of their property rights, which claims may ultimately result in the payment of fair compensation by the public. As a result, the proposed rules and regulations could act as a subsidy to transmission line owners who will reap the benefit of paying wire-crossing licensing fees markedly lower than market value, while the public pays the difference. As the proposed rules and regulations constitute a taking for which compensation will be due, they create significant and unnecessary liability to the public and therefore are not in the public interest and should not be adopted.

II. The Proposed Rules and Regulations are Vague and Indefinite and Deny Due Process and Therefore Should Not be Adopted.

The Nebraska Supreme Court has stated that,

The due process command imposed by Amendment XIV to the Constitution of the United States, and Article I, section 3, Constitution of Nebraska, translates into two basic requirements. The statute's language must be sufficiently specific that persons of ordinary intelligence must not have to guess at its meaning. The statute must contain ascertainable standards by which it may be applied. This does not demand total absence of vagueness in a statute, but merely requires that a statute provide adequate notice of what conduct it requires or prescribes as well as guidelines by which a violation of the statute may be fairly and nonarbitrarily determined.

In Interest of D.L.H., 198 Neb. 444, 448-449, 253 N.W.2d 283, 286 (1977).

The Nebraska Supreme Court addressed this issue with regard to proposed liquor distribution statutes, stating that

The administration of the law is placed in the hands of the Nebraska Liquor Control Commission with but little in the way of standards to guide the commission. The act is replete with terminology which is vague and indefinite. The commission is to determine whether requirements set by the manufacturer are ‘reasonable and material.’ Manufacturers are prohibited from doing any act ‘unfair to the distributor’, and from ‘unfairly, without due regard to the equities of the distributor’ canceling or failing to renew the franchise. A Colorado statute using similar terminology was held to deny due process because it failed to provide an ascertainable standard of guilt. General Motors Corp. v. Blevins, 144 F.Supp. 381 (1956).

U.S. Brewers’ Assoc., Inc. v. State of Nebraska, et al., 192 Neb. 328, 335, 220 N.W.2d 544, 549 (1974).

The proposed regulations under consideration here likewise contain several provisions setting forth vague and indefinite standards. Section 003.04D1 provides that the “Commission may require the parties to provide such information **as may be necessary** for the Commission to reach a decision on the unresolved issues.” (Emphasis Added). Section 003.04D2 provides, in part, that “[i]n determining the terms, conditions and charges, the Commission shall consider whether such terms, conditions and charges **are fair, just and reasonable and in the public interest.**” (Emphasis Added). Section 003.05 provides that “[t]he commission may reject a wire crossing agreement if it finds that the wire crossing agreement is **not in the public interest.**” (Emphasis Added).

Such standards are vague and indefinite, and fail to provide ascertainable standards or criteria with respect to the Commission’s authority to seek information from parties, determine the fairness and reasonableness of terms, establish the conditions and charges in a wire crossing agreement, or elect to reject a wire crossing agreement. Indeed, the “fair, just and reasonable” standard enunciated in Section 003.4D2 is nearly identical

to the insufficient standards discussed in U.S. Brewers. Thus, as the proposed rules and regulations fail to provide ascertainable standards for the authority of the Commission, they deny due process and are void.

III. The Proposed Rules and Regulations are Beyond the Jurisdiction of the Commission and Therefore Should Not be Adopted.

Proposed Rule and Regulation No. 170 is overly broad in that it proposes to grant authority beyond the scope of the jurisdiction granted to the Commission to promulgate rules and regulations pursuant to Neb. Rev. Stat. §§ 75-702 to 75-724 (Reissue 2003).

Neb. Rev. Stat. §§ 75-703 and 75-707 establish the jurisdiction and authority of the Commission to adopt regulations and regulate agreements concerning wire line crossings of railroad tracks at public highways. Neb. Rev. Stat. § 75-703 provides that “The commission shall adopt and promulgate rules and regulations **prescribing the manner in which the wires specified in Section 75-702 will cross such railroad tracks in this state at public highway crossings.**” (Emphasis Added). The clear language of the statute indicates that the Commission has jurisdiction solely to adopt and promulgate rules and regulations which prescribe the **manner** in which wires cross railroad tracks.

Likewise, the authority granted to the Commission under Neb. Rev. Stat. § 75-707 (Reissue 2003) is similarly limited. Section 75-707 provides that the Commission shall regulate crossings, and in the event a crossing entity and railroad are unable to agree on the terms and conditions of a crossing at a public highway, “the commission shall determine the terms and conditions **subject to the provisions of sections 75-702 to 75-708.**” (Emphasis Added) As indicated in the above paragraph, Section 75-703 provides authority solely to regulate the **manner** in which wires cross railroad tracks. As this

limitation was incorporated into the authority of section 75-707, the Commission is likewise limited in its authority to regulate the terms of crossing agreements pursuant to Section 75-707.

The other sections referenced in Section 75-707 similarly restrict the Commission's authority to the manner of crossing. Section 75-702 provides that "[t]he commission shall have **general supervision** over any and all wires for transmitting electric current, or any other wire whatsoever, which crosses under or over any railroad track in this state at public highway crossings." (Emphasis Added). While the Commission may have "general supervision" over wires crossing railroad tracks at public highway crossings, such authority is restricted by 75-703 to the manner of crossing and does not permit the commission to regulate or dictate the broader terms of wire crossing agreements.

Section 75-704 states that it is "unlawful for any person to place any wire across any railroad track in this state at public highway crossings except in such manner as may be prescribed by the commission." This statute links the scope of the Commission's authority to the manner in which wire is placed, again showing that the Commission's power to regulate does not extend to the broader terms of the agreements between the parties.

Similarly, Section 75-705 gives the Commission the authority to order the relocation of wires that are "strung over the track contrary to or not in compliance with the rules prescribed by the commission", and Section 75-706 provides that the Commission shall not prescribe a clearance less than certain specified heights above the

rails. These sections again establish a clear scope of the authority of the Commission to regulate the manner in which wires cross lines, but nothing further.

The proposed regulations of the Commission would give the Commission broad authority to determine the terms of crossing agreements beyond the manner of crossing, conceivably including such matters as dictating licensing fees, allocating insurance burdens, prescribing construction schedules, and specifying entry and notice requirements. These matters do not concern the **manner** in which wires cross railroad tracks, but rather relate to the financial terms, allocation of risk, and other aspects of the relationship between the parties. Inasmuch as the proposed regulations purport to allow the Commission to determine matters beyond the manner in which wires cross railroad tracks, the proposed regulations are beyond the jurisdictional authority of the Commission.

IV. The Proposed Rules and Regulations May Impair BNSF's

Obligations Under Contract and Therefore Should Not be Adopted.

Nebraska courts have acknowledged that legislation may be held invalid where such legislation substantively changes the existing agreements of a regulated party. U.S. Brewers at 332, 220 N.W.2d at 548 (stating that, "In Globe Liquor Co. v. Four Roses Distillers Co., 281 A.2d 19 (1971), the Supreme Court of Delaware held the Franchise Security Law of that state invalid as an impairment of the obligation of contract because of the substantive change the act made in the rights and obligations of a distributor's contract."). To the extent that BNSF has preexisting joint bargaining agreements in place with its employees, unions or contractors that require it to maintain certain insurance,

entry notice or other safety measures with regard to electrical crossings, the proposed regulations would impair BNSF's ability to act in accordance with those agreements.

Additionally, the proposed regulations may cause electrical service providers to renegotiate existing electrical crossing licenses if they believe the Nebraska Public Service Commission may be willing to agree to more favorable terms than they have received in their existing crossing agreements. Accordingly, as the proposed regulations are likely to impair the obligations of BNSF or crossing licensees with regard certain existing agreements, such regulations are invalid.

V. The Proposed Rules and Regulations Unduly Restrict the Right of Freedom to Contract and Bear No Reasonable Relation to the Public Health, Safety, and Welfare, and Therefore Should Not be Adopted.

The Supreme Court of Nebraska has stated that "Freedom to contract and to acquire and sell property in a lawful manner are valuable constitutional rights. The power of the Legislature to regulate and restrict the exercise of these rights is limited by the Constitution of [the State of Nebraska] and the United States." U.S. Brewers' Assoc., Inc. v. State of Nebraska, et al., 192 Neb. 328, 333, 220 N.W.2d 544 (1974).

The Supreme Court of Nebraska has further stated that,

Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. A citizen has a Constitutional right to own, acquire, and sell property; and if it is apparent that a statute under the guise of police regulation does not tend to preserve the public health, safety, or welfare but tends to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual.

Id. (citing, Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N.W.2d 227 (1960)). The proposed rules and regulations under consideration here unduly restrict the freedom to

contract and do not bear a reasonable relation to the public health, safety, and welfare, and consequently should not be adopted.

In U.S. Brewers, the Nebraska Supreme Court examined the propriety of statutes that imposed a system of regulation upon the distribution of liquor. The statute at issue provided that, before a manufacturer could terminate a distributorship or establish a new or additional distributorship, the manufacturer would be required to file an application with the Nebraska Liquor Control Commission (“LCC”). Id. at 330, 220 N.W.2d at 547. The statute further required that the manufacturer bear the burden of showing good cause to make such a change in its distribution, and authorized the LCC to determine whether such good cause existed. Id. at 330, 220 N.W.2d at 547. The Court held that the regulation bore no reasonable relationship to protecting the public health or securing the public safety and welfare, stating

The legislation in question has two declared purposes: The fostering and promoting of temperance and obedience to the law, and the protection of distributors against termination of their franchises without cause. The effect of the act upon temperance or obedience to the law is remote and speculative. It would not regulate the retail distribution of products and would have little or no effect upon consumption of the product by the public. The only possible effect of the act in this regard is that it would transfer control of the distribution of a particular product from the manufacturer of that product to the distributor. There is no reason to believe that distributors collectively desire to sell less products than do the manufacturers. There is no reasonable relationship between the act and the fostering or promoting of temperance and obedience to the law, and it cannot be justified on that ground.

Id. at 334, 220 N.W.2d at 548-549.

With regard to proposed Rule and Regulation No. 170, it is likewise apparent that the authority granted by the proposed regulations bears no reasonable relation to the preservation of the public health, safety, or welfare. Section .003.04 of the proposed regulations provides that “If a railroad and a crossing entity are unable to negotiate a

binding wire crossing agreement within sixty (60) days as provided under Section 003.02, either party may petition the Commission, requesting a hearing on the disputed terms, conditions and charges of the wire crossing agreement.” Section 003.04D2 further provides, in part, that “[t]he commission shall have thirty (30) days from the date of hearing to issue an order resolving each issue set forth in the petition and the response with written findings and opinions. In determining the terms, conditions and charges, the Commission shall consider whether such terms, conditions and charges are fair, just and reasonable and in the public interest.”

These regulations are obviously intended to mediate wire crossing agreement disputes between railroads and transmission line operators. Inasmuch as the proposed regulations would permit the Commission to regulate the “terms, conditions and charges” of wire crossing agreements, such authority is far too broad and encompasses elements of wire crossing agreements that bear no reasonable relation to the preservation of the public health, safety, or welfare.

Such authority would conceivably extend to regulation of wire crossing agreement terms such as required insurance, timeframes for conducting maintenance and construction, license fees and entry and notice requirements. The regulation of terms such as these in wire crossing agreements, while of interest to the railroads and electrical service providers, would not serve to protect the public health, safety, or welfare. These matters do not concern the public, as they are solely financial concerns of the subject railroads and service providers seeking to allocate the costs and risks associated with transmission line crossings. Such invasive regulation simply is not reasonably related to the preservation of the public health, safety, or welfare. Accordingly, such regulations

are an unreasonable restriction of the right of freedom to contract and in violation of the Constitution of the State of Nebraska and the Constitution of the United States.

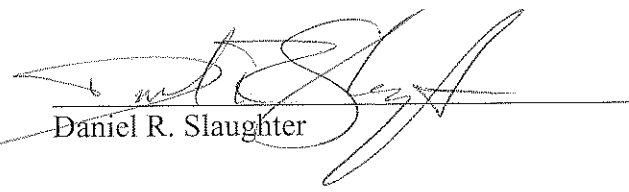
Conclusion

The proposed rules and regulations are unconstitutional in that they unduly restrict the right of freedom to contract and bear no reasonable relation to the public health, safety and welfare, and are vague and indefinite so as to deny due process. Additionally, the proposed rules and regulations are not within the jurisdiction of the Commission as set forth in the Nebraska statutes, and may impair the obligations of regulated parties under contract. As a result, the proposed rules and regulations are void and should not be adopted. Moreover, as a matter of policy, the implementation and enforcement of the proposed rules and regulations would constitute a governmental taking for which compensation is due, and could act as an indirect public subsidy of transmission line infrastructure costs. Accordingly, the proposed rules and regulations are not in the public interest and should not be adopted.

These comments are respectfully offered this 14th day of November, 2007 by
BNSF Railway Company.

BNSF RAILWAY COMPANY

By:


Daniel R. Slaughter